IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.* Plaintiffs, vs. TYSON FOODS, INC., *et al.* Defendants.	Case No. 05CV0329-GKF-PJC

DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' NEW AND UNDISCLOSED EXPERT OPINIONS
[MISC. EXHIBITS TO DKT. NOS. 2058, 2064, 2071, 2072, 2074, 2083, 2103, 2116, 2130, 2156, 2158 AND 2198]

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Plaintiffs have recently submitted hundreds of pages of new, previously undisclosed expert analysis and opinions. These untimely and undisclosed expert opinions will require a new round of expert rebuttal work from Defendants' experts unless they are stricken in accordance with the Federal Rules and this Court's scheduling Orders. Accordingly, Defendants respectfully file this Motion to Strike Plaintiffs' New and Undisclosed Expert Opinions [Misc. Exhibits to Dkt. Nos. 2058, 2064, 2071, 2072, 2074, 2083, 2103, 2116, 2130, 2156, 2158, and 2198], and state as follows:

I. BACKGROUND

Plaintiffs' expert reports were originally due December 3, 2007. [Dkt. No. 1075]. In October 2007, the Court granted Plaintiffs an across-the-board extension until April 2008 to submit expert reports on all issues other than damages. [Dkt. No. 1376]. In March 2008, Plaintiffs again sought and were granted another enlargement of time, until May 2008, to submit their non-damages expert reports, and thereafter secured a third extension for reports from a subset of non-damages experts. [Dkt. Nos. 1658 and 1706, respectively].

Throughout the course of this litigation, the aggregation of Plaintiffs' delays has required defense experts to revisit work already completed, in some cases to re-start their work from the beginning, and has generally impeded Defendants' ability to prepare their case for trial. *See generally,* Dkt. No. 1759. Plaintiffs' multiple late submissions, Magistrate Judge Joyner noted, were "extremely unfortunate" as they were "detrimental to the timely resolution of this case" and "force[d] the Court to extend the date Defendants' expert reports are due." [Dkt. No. 1787].

Even after Magistrate Judge Joyner's admonition, during the deposition of Dr. Dennis Cooke, Plaintiffs attempted to enter into evidence a supplemental report incorporating samples taken, data compiled, and analysis performed well-beyond the deadline for submission of the

Cooke and Welch report. In response to Defendants' objections, Plaintiffs moved in January 2009 for leave to submit belatedly this untimely supplementation. [Dkt. No. 1826]. On January 29, 2009, this Court held that "a supplemental expert report that states additional opinions or rationales or seeks to 'strengthen' or 'deepen' opinions expressed in the original expert report exceeds the bounds of permissible supplementation and is subject to exclusion under Rule 37(c)(1)," and denied admission of the Cooke-Welch supplement. [Dkt. No. 1839].

Likewise, during the depositions of Defendants' experts Alex Horne, Glenn Johnson, and Brian Murphy, Plaintiffs again attempted to introduce new work and new analysis generated by Plaintiffs' experts after the final deadline for the complete disclosure of Plaintiffs' expert work in this case. Over defense objections, this pattern of behavior continued throughout several of the depositions, always with Plaintiffs' counsel claiming that the new information was simply "rebuttal" permitted by this Court. To the contrary, Plaintiffs were injecting new data and analysis into evidence.

Defendants filed a Motion for Clarification on this issue, and in its April 17, 2009 Opinion and Order, this Court held:

> Rebuttal denotes evidence introduced by a plaintiff to meet new facts brought out in his opponent's case in chief. At trial, it is properly within the discretion of the trial judge to limit rebuttal testimony to that which is precisely directed to rebutting new matter or new theories presented by the defendant's case-in-chief. ***Rebuttal is not an opportunity for the correction of any oversights in the plaintiff's case in chief***.[1] [Dkt. Nos. 1972 and 1989, respectively] (Internal citations omitted; emphasis added).

In spite of the Court's clarifications regarding rebuttal and supplemental expert work, Plaintiffs have continued to submit new expert opinions belatedly, as evidenced by their recent

[1] Further, this Court held in its January 29, 2009, Order that only "true" rebuttal testimony would be permitted during the trial. [Dkt. No. 1842].

filings incorporating newly-disclosed work and opinions contained in declarations of multiple Plaintiffs' experts and in declarations of previously unidentified "witnesses" who claim to be experts for Plaintiffs (specific instances of such supplemental work are discussed *infra*).

This Court's previous Orders directly address the issue of supplemental and rebuttal expert opinions. For example, Magistrate Judge Joyner's Opinion and Order of October 28, 2007, regarding the Scheduling Order and distinguishing between errata to correct a report and supplementation to bolster an expert report, expressly instructed that late expert opinions would only be permitted to the extent they corrected actual errors in the experts' previously-submitted work. [Dkt. No. 1787].

In keeping with Magistrate Judge Joyner's Order, any supplemental work completed by Plaintiffs' (disclosed or previously undisclosed) experts should be stricken, as the new material inappropriately serves to bolster the experts' work with new, supplemental opinions or to introduce new experts at this late stage of the case who offer their opinions to attempt to bolster or deepen the opinions of experts who issued timely reports for Plaintiffs. Admission of, or reliance upon, these additional, supplemental, and untimely opinions, in some cases from previously undisclosed "experts", allows Plaintiffs to present a moving target for Defendants as exhibit and trial deadlines loom. Defendants request once again that the Court rein in Plaintiffs' continued violations of its scheduling Orders by striking the untimely, supplemental declarations offered by both disclosed and previously undisclosed "experts."

II. LEGAL STANDARD

Courts faced with the decision whether or not to admit supplemental expert opinions first consider Fed. R. Civ. P. 26(e), which provides, in pertinent part:

> (1) In General. A party who has made a disclosure under Rule 26(a) – or who has responded to an interrogatory, request for production, or request

> for admission – must supplement or correct its disclosure or response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing . . . .
>
> (2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

While an affirmative duty to correct errors in expert reports exists, this duty does not extend beyond correcting or completing errors in original reports. As this Court confirmed in its January 29, 2009 Order, "the right to supplement under Rule 26(e) is not without limits." [Dkt. No. 1839]. In first analyzing this issue, this Court determined that a report which attempts to "strengthen or deepen" the original opinions expressed by the expert in fact exceeds the bounds of permissible supplementation. [Dkt. No. 1839].

Further, this Court has noted that Rule 26(e) "allows supplementation of expert reports only where a disclosing party learns that its information is ***incorrect or incomplete***." Citing *Quarles v. United States*, 2006 U.S. Dist. LEXIS 96392 (N.D. Okla. Dec. 5, 2006) (emphasis added). [Dkt. No. 1787]. The court in *Quarles* struck additional testing performed by the plaintiff's expert after submission of the original expert report, relying on *Akeva v. Mizuno*, 212 F.R.D. 306, 310 (M.D.N.C. 2002), which states:

> Rule 26(e) envisions supplementation when a party's discovery disclosures happen to be defective in some way so that the disclosure was incorrect or incomplete and, therefore, misleading. ***It does not cover failures of omission because the expert did an inadequate or incomplete preparation***. ***To construe supplementation to apply whenever a party wants to bolster or submit additional expert opinions would [wreak] havoc in docket control and amount to unlimited expert opinion preparation***. (Emphasis added).

As the court in *Akeva* foretold, unlimited supplemental testing, analysis, and opinions by experts would result in moving targets for opposing parties and prohibit the timely resolution of cases relying upon expert testimony.

Additional Tenth Circuit case law addressing this specific issue confirms the findings in *Akeva*. *See generally, Akeva v. Mizuno*, 212 F.R.D. 306, 310 (M.D.N.C. 2002); *Cohlmia v. Ardent Health Servs., LLC*, 2008 WL 3992148 (N.D. Okla. Aug. 22, 2008); *Quarles v. United States*, No. 00-CV-0913, 2006 U.S. Dist. LEXIS 96392 (N.D. Okla. Dec 5, 2006); *and Palmer v. Asarco Inc.*, No. 03-CV-059, 2007 U.S. Dist. LEXIS 56969 (N.D. Okla. Aug. 3, 2007). Plaintiffs in the instant matter are impermissibly supplementing their experts' work by introducing this newly-created work through the proverbial backdoor, as declarations attached to recent motions and responses.

Aside from the portions of Rule 26 disallowing unlimited supplementation of expert reports, Rule 26 also requires the disclosure of experts: "In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rules of Evidence 702, 703, or 705." Rule 26(e) does not allow a party to use supplemental reports to "sandbag one's opponents with claims and issues which should have been included in the expert witness' report." *Palmer v. Asarco, Inc.*, No. 03-CV-059, 2007 U.S. Dist. LEXIS 56969, at *15 (quoting *Leviton Mfg. Co. v. Nicor, Inc.*, 245 F.R.D. 524 (D.N.M. 2007)).

In determining whether an untimely expert disclosure or report violation nevertheless may be permitted, courts consider four factors: whether 1) the party against whom the expert testimony is offered is prejudiced or surprised; 2) the offering party can cure the resulting prejudice; 3) the late testimony would disrupt trial; and 4) the offering party is acting in bad

faith. *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999). Undoubtedly, here, Defendants are parties prejudiced by untimely contributions by Plaintiffs' experts. As discussed in greater detail below, Plaintiffs' recent summary judgment and *Daubert* briefs are accompanied by a number of declarations setting out new expert work and opinions, in some cases from previously-undisclosed experts. As in *Palmer*, Defendants are faced with declarations that are "essentially… new expert report[s] with new opinions, and defendants would need to depose [the expert] before trial to prepare a meaningful *Daubert* challenge." *Palmer*, 2007 U.S. Dist. LEXIS 56969, at *13.

Fed. R. Civ. P. 37(c)(1) states that "if a party fails to provide information or identify a witness as required by Rule 26(a) or 26(e), the party is not allowed to use that information or witness ***to supply evidence on a motion***, at a hearing, or at a trial," (emphasis added). Therefore, under Rule 37, the appropriate remedy for undisclosed expert declarations is to strike these documents in their entirety. In a situation involving a case of this magnitude, adherence to this Court's Orders regarding discovery is crucial to ensuring a timely and efficient discovery process. Plaintiffs' attempt to use various *Daubert* and dispositive motions as an opportunity to fix their expert case, as illustrated by the declarations discussed *infra*, so near the trial date is unacceptable. Accordingly, Defendants request the Court strike these certain declarations proffered by Plaintiffs both through disclosed and previously undisclosed experts.

Specifically, Defendants move this Court for an order striking the following declarations in their entirety: Rick Chappell [Dkt. No. 2072-6, Ex. E and 2198, Ex. E]; Jim Loftis [Dkt. Nos. 2064-5, Ex. 4; 2083-4, Ex. C; 2074-4, Ex. C; 2072-5, Ex. D; 2116-6, Ex. H; and 2198, Ex. D]; Michael Sadowsky [Dkt. Nos. 2116-1, Ex. D1; 2116-2, Ex. D2; and 2116-3, Ex. E]; Tamzen Macbeth [Dkt. No. 2116-4, Ex. F]; Jennifer Weidhaas [Dkt. No. 2116-5, Ex. G]; Darren Brown

[Dkt. No. 2058-7, Ex. F]; Roger Olsen [Dkt. Nos. 2103-10, Ex. 116; 2064-4, Ex. 3; and 2083-5, Ex. D]; Christopher Teaf [Dkt. No. 2071-4, Ex. C; 2130-3, Ex. 82; and 2156-2, Ex. 1]; Bernard Engel [Dkt. No. 2158-1, Ex. C]; and Berton Fisher [Dkt. No. 2198, Ex. H].

III. DISCUSSION

A. Rick Chappell's declarations filed in support of Plaintiffs' *Daubert* challenge to Dr. Charles Cowan and in response to Defendants' *Daubert* challenge to Dr. Roger Olsen present untimely testimony from an undisclosed expert and should be stricken.

Plaintiffs support their Motion in Limine to exclude Defendants' witness Charles Cowan, Ph.D., and their response opposing Defendants' Motion to exclude Plaintiffs' witness Roger Olsen, Ph.D., with the testimony of a previously undisclosed expert, Dr. Rick Chappell. [Dkt. No.2072-6, Ex. E and Dkt. No. 2198, Ex. E]. Plaintiffs failed to disclose Dr. Chappell pursuant to Federal Rule of Civil Procedure 26(a)(1) or Federal Rule of Evidence 702, 703, or 705. *See* Plaintiffs' April 1, 2008, letter to Defendants listing Rule 26 Testifying Experts. [Attached as Exhibit A]. Because Plaintiffs failed to disclose Dr. Chappell, Defendants have not been provided with any of the mandated disclosures regarding his expertise or opinions and the basis for the opinions, nor have they had the opportunity to discover or review his considered materials and to depose him.[2] This failure is substantially prejudicial to Defendants, as Defendants are hindered in their ability to assess Dr. Chappell's claims, disclosures, and opinions in meeting his attack on Dr. Cowan's disclosed work in this case. Dr. Chappell, therefore, may neither testify at trial nor in support of a *Daubert* motion. *See Honaker v. Innova*, 2007 U.S. Dist. LEXIS 30222, at **2-3 (W.D.K.Y. Apr. 23, 2007) ("Federal Rules provide that when a party fails to make Rule

[2] While Defendants have requested Plaintiffs to produce Dr. Chappell's materials, this in no way constitutes a waiver of the untimeliness of the opinions and/or work by Chappell, nor does it excuse the failure to make complete, timely Rule 26 disclosures regarding his status as a witness in the case. *See* Exhibit B.

26 disclosures, and those failures are not harmless, the party may not use the non-disclosed evidence at a trial, a hearing, ***or on a motion***.") (emphasis added).

Dr. Chappell's declaration is doubly improper because he provides extensive testimony regarding the manner in which the principal component analysis of Plaintiffs' expert Dr. Olsen was designed and executed, details that should properly have been included in Olsen's report, considered materials, or deposition. *See generally* Dkt. No. 2072-6, Ex. E. For example, Dr. Chappell purports to explain how Dr. Olsen supplied values for missing test results. *Id.* at ¶11. He purports to explain the proper procedure for gathering Dr. Olsen's datasets. *Id.* at ¶8. And, he references Dr. Olsen's "protocols" without ever actually identifying where Olsen used or set them out. *Id.* at ¶9. Dr. Chappell also submitted 36 pages of declaration in support of Plaintiffs' response to Defendants' *Daubert* motion seeking to preclude Dr. Olsen's work. *See* Dkt. No. 2198, Ex. E. This second declaration likewise supplies new explanations and background facts that should properly have come from Dr. Olsen in a timely manner compliant with the rules of discovery.

The reason Dr. Chappell has such intimate familiarity with Dr. Olsen's work is because Chappell apparently performed large portions of it. *See* Olsen 9-11-08 Depo. at 23:8-26:20; *see, e.g.*, *id.* at 300:22-301:5 (Dr. Chappell "had the expertise in the programs to run the statistical analysis"); *id.* at 301:6-15 (Dr. Chappell, not Dr. Olsen, ran SysStat and generated every PCA run produced in support of Olsen's report); *id.* at 308:7-309:9 (Dr. Chappell wrote the proprietary software that sets up Dr. Olsen's PCA runs). Yet Plaintiffs never made the appropriate disclosures to identify Dr. Chappell as a potential testifying expert. As a result, Defendants know very little about Dr. Chappell's work and have had no opportunity to depose

him. Despite these failures, Plaintiffs have now submitted two declarations which supplement Dr. Olsen's report and discovery with new background facts and analysis.

As the Seventh Circuit made clear in *Dura Automotive Sys. v. CTS Corp.*, 285 F.3d 609 (7th Cir. 2002), a party cannot rescue an expert from a *Daubert* challenge by submitting declarations from other experts whose work went beyond mere technical assistance and into independent professional judgment. *Id.* at 613-14. To do so is to submit a new expert report. Here, in essentially designing Dr. Olsen's PCA work, and as evidenced by the fact that he, not Olsen, is called upon to explain it, Dr. Chappell clearly exercised independent judgment.

Rule 26 "serves an important purpose in apprising a party of the views of the opposing party's experts and permits adequate preparation for depositions and cross-examination at trial." *Falconcrest Aviation, L.L.C. v. Bizjet Int'l Sales & Support, Inc.*, No. 03-CV-577, 2006 WL 1266447, at *1 (N.D. Okla. May 3, 2006) (citing *Anderson v. Hale*, No. CIV-02-0113-F, 2002 WL 32026151, at *2 (W.D. Okla. Nov. 4, 2002)). Because Plaintiffs provided neither timely disclosures required by Rule 26 nor an expert report for Dr. Chappell, he consequently may not "supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." *See* Fed. R. Civ. P. 37(c)(1). Further, a party "is justified in [its] expectation that [the] identity [of the other party's attack witness] would have been disclosed under Fed. R. Civ. P. 26(a)," even though a court generally may consider otherwise inadmissible evidence in connection with *Daubert* briefing. *See Reed v. Smith & Nephew, Inc.*, 527 F. Supp. 2d 1336, 1347-48 (W.D. Okla. 2007) (striking "attack expert" affidavit filed in support of motion to exclude expert testimony).

Courts, including this Court, have not allowed parties to flout the purpose of the Federal Rules of Civil Procedure through untimely "attack experts" and self-bolstering expert affidavits.[3] Indeed, even where a party provided timely expert disclosures and report, this Court has rejected improper attempts to "buttress" an expert report made in the guise of supplemental reports. *See Palmer*, 2007 U.S. Dist. LEXIS 56969, at *16-18; *Quarles v. United States*, No. 00-CV-0913, 2006 U.S. Dist. LEXIS 96392, at *16 (N.D. Okla. Dec. 5, 2006) (striking untimely attempt to "bolster" expert report as prejudicial). To the extent Plaintiffs wished to rely on Dr. Chappell's work, he should have been timely disclosed as an expert witness to allow Defendants a fair opportunity to consider his testimony. *See* Fed. R. Civ. P. 26(a)(2) (requiring written and timely disclosures of all expert testimony upon which a party may rely); *Dura*, 285 F.3d at 613-14 (striking affidavits from previously undisclosed experts offered in support of *Daubert* briefing); *Palmer v. ASARCO Inc.*, 2007 WL 2254343, at **2-5 (N.D. Okla. Aug. 3, 2007) (excluding affidavit attached to opposition to *Daubert* motion that supplied new analyses and previously undisclosed opinions). However, Plaintiffs may not now submit Dr. Chappell's declaration to attack Dr. Cowan's opinions and to bolster Dr. Olsen's opinions with new information and analysis. *Id.* Because Dr. Chappell was undisclosed as an expert by Plaintiffs and in light of the resulting delays that would be caused by the admission of his untimely declarations, the declarations should be stricken.

B. Jim Loftis's declarations present untimely testimony from an undisclosed expert and should be stricken.

[3] *See, e.g.*, *Palmer v. Asarco Inc.*, No. 03-CV-059, 2007 U.S. Dist. LEXIS 56969, at *18-19 (N.D. Okla. Aug. 3, 2007) (striking bolstering affidavit); *Reed*, 527 F. Supp. 2d at 1348; *Hudgins v. Vermeer Mfg. Co.*, 240 F.R.D. 682, (E.D. Okla. 2007) (striking bolstering expert report); *Leathers v. Pfizer, Inc.*, 233 F.R.D. 687, 699 (N.D. Ga. 2006) (striking bolstering expert report); *Dixie Steel Erectors, Inc. v. Grove U.S. L.L.C.*, No. CIV-04-390-F, 2005 WL 3558663, at *10 (W.D. Okla. Dec. 29, 2005) (striking attack declaration).

1. Dr. Loftis's declarations filed in support of Plaintiffs' Daubert *challenges to Drs. Andy Davis, Glenn Johnson, Brian Murphy, Charles Cowan, and Roger Olsen present new, supplemental testimony from an undisclosed witness and should be stricken.*

To support their challenges to Defendants' experts Johnson, Cowan, Murphy, Davis, and Olsen, Plaintiffs improperly rely on the declarations of Jim Loftis. [Dkt. Nos. 2064-5, Ex. 4; 2083-4, Ex. C; 2074-4, Ex. C; 2072-5, Ex. D; 2198, Ex. D]. As discussed with regard to Dr. Chappell, *supra*, allowing Plaintiffs to launch a surprise attack on Defendants' experts through Dr. Loftis's new, untimely "expert" declaration – after discovery has closed and the deadline for submitting expert reports has long since expired – would greatly prejudice Defendants. Plaintiffs have not offered and cannot provide any reasonable justification as to why they should be allowed to submit the untimely, supplemental opinions contained in Dr. Loftis's declarations at this stage of the case. Therefore, the Court should strike the Loftis declarations in their entirety.

As discussed *supra*, Rule 26(e) does not allow a party to use supplemental reports to "sandbag one's opponents with claims and issues which should have been included in the expert witness' report." *Palmer*, 2007 U.S. Dist. 56969, at *15 (quoting *Leviton Mfg. Co. v. Nicor, Inc.*, 245 F.R.D. 524 (D.N.M. Apr. 20, 2007)). Simply put, an undisclosed witness may not submit an untimely affidavit to bolster expert opinions or to support *Daubert* motions seeking to exclude such opinions through "attack" opinions. *See, e.g.*, *Palmer v. Asarco Inc.*, No. 03-CV-059, 2007 U.S. Dist. LEXIS 56969, at *16-18 (N.D. Okla. Aug. 3, 2007)

Expert discovery for Plaintiffs' non-damages experts closed in May 2008. [Dkt. No. 1658]. Defendants are busy preparing to meet the Court's pretrial deadlines, in addition to preparing for the September 21 start of trial. The late use of Dr. Loftis to support attacks on defense expert opinions with his own untimely new opinions and analysis results in "significant prejudice" to Defendants. *Id.* at 14. Further, "it would undercut the spirit of Rule 26 to permit a

party to avoid the sanctions of Rule 37 merely by offering a witness up for deposition."[4] *Falconcrest Aviation*, 2006 U.S. Dist. LEXIS 26356, at *15. Plaintiffs clearly are attempting to circumvent this Court's Order explicitly precluding supplemental and rebuttal reports (Dkt. No.1842) through untimely expert declarations. Notably, Plaintiffs have provided no argument that the untimely, improper, prejudicial expert declaration by Dr. Loftis to buttress Roger Olsen[5] and to attack defense experts is justified. Even if the Court determines that Plaintiffs were not acting in bad faith by making the improper submission, however, lack of bad faith cannot overcome the weight of the other factors discussed herein. *See Palmer*, 2007 U.S. Dist. LEXIS 56969, at *18.

Allowing Dr. Loftis's declaration at this late date would surely cause trial preparation delays because Defendants would require time to obtain and review his materials, and then to prepare for and take his deposition. These delays could potentially necessitate the change of the trial date, something Defendants wish to avoid.

Because Plaintiffs did not disclose Dr. Loftis as a testifying expert and in light of the resulting delays that would be caused by the admission of his untimely declarations, the declarations should be stricken.

> *2. Dr. Loftis's declaration filed in support of Plaintiffs' Response to Defendants'* Daubert *challenge to Dr. Valarie Harwood presents untimely, supplemental testimony and should be stricken.*

[4] While Defendants have requested Plaintiffs to produce Dr. Loftis's materials, this in no way constitutes a waiver of the untimeliness of the opinions and/or work by Loftis, nor does it excuse the failure to disclose his status as a witness in the case. *See* Exhibit B.

[5] Plaintiffs similarly attempt to defend Dr. Olsen's work by attaching a 20-page declaration from Dr. Loftis supplying new explanations and justifications for Olsen's work and purporting to "peer review" his PCA methodology. This is new and undisclosed expert work that should be stricken. *See* Dkt. No. 2198, Ex. D.

Plaintiffs also rely on another declaration by Dr. Loftis in their efforts to rebut Defendants' *Daubert* challenge to Plaintiffs' expert Dr. Valerie Harwood. [Dkt. No. 2116-6, Ex. H]. Dr. Loftis' declaration merely serves to bolster and supplement Dr. Harwood's report, as she admitted during her deposition testimony that she did not do any statistical analysis. *See* Dkt. No. 2159, at 1 n.2, 4 n.7. Again, this new analysis performed by Dr. Loftis for Dr. Harwood should have been submitted on a timely basis, and Plaintiffs provide no reasonable explanation why it was not.

The work and analysis performed by Dr. Loftis and just now disclosed in the context of defending a *Daubert* motion challenging Dr. Harwood's opinions is inappropriate; this is work and analysis that should properly have been included in Harwood's report, considered materials, or deposition. Dr. Harwood is not allowed now to rescue her unreliable report and opinions at this late date through the declaration of an undisclosed expert. If a disclosed, testifying expert who has submitted an expert report and who has been deposed may not submit an untimely affidavit or report to bolster his own opinions, as this Court has previously held,[6] then certainly an undisclosed expert like Dr. Loftis cannot do it. Therefore, Dr. Loftis's declaration in support of Dr. Harwood's testimony should be stricken in its entirety.

C. Dr. Sadowsky's declaration filed in support of Plaintiffs' Opposition to Dr. Harwood's *Daubert* challenge presents untimely, supplemental testimony and should be stricken.

As with Drs. Chappell and Loftis, discussed *supra*, Plaintiffs have introduced new testimony through a declaration (and corresponding attachments) of a previously undisclosed expert, Michael J. Sadowsky, Ph.D., in an attempt to bolster the scientific credibility of the work of Dr. Valarie Harwood. [Dkt. Nos. 2115; 2116-1, Ex. D1; 2116-2, Ex. D2; and 2116-3, Ex. E].

[6] *See generally* Dkt. Nos. 1787, 1839, 1842.

In essence, Dr. Sadowsky performed a previously undisclosed "review" of Dr. Harwood's work in this case, then filed a declaration reporting upon that review. Dr. Sadowsky's declaration should not be permitted for a number of reasons: it was submitted long after the close of discovery and the deadlines for submission of expert reports; it contains completely new analyses, methodologies, and conclusions that were never timely disclosed in any prior report; and it is intended to fill gaps and correct deficiencies Defendants have identified in Dr. Harwood's work. *See* Dkt. No. 2159, at 4-6.

Dr. Sadowsky's declaration and accompanying 64-page report are nothing less than an entirely new and undisclosed expert report, and are far from harmless error. Plaintiffs made no timely disclosures with respect to Dr. Sadowsky's expertise, his opinions, or the basis for his opinions as required by the Court's scheduling Orders. And, indeed, the analysis he offers was in large part performed ***after*** the deadline for expert disclosures in this case. *See* Dkt. No. 2115, Ex. D, Attach. 1 ("Draft Final Project Report to Camp, Dresser & McKee . . . May 26, 2009). Consideration of this report will cause prejudice to Defendants that cannot be cured, as Defendants have had no opportunity to test Dr. Sadowsky's work with regard either to trial or current briefing. Allowing Defendants such a (rightful) opportunity will require disrupting trial schedule or preparations. Therefore, the Court should strike, in its entirety, the declaration and attachment of Dr. Sadowsky.

D. The declarations of Tamzen Macbeth, Ph.D. and Jennifer Weidhaas, Ph.D. filed in support of Plaintiffs' Opposition to Dr. Harwood's *Daubert* challenge present untimely new testimony and should be stricken.

Plaintiffs' have introduced declarations by Drs. Macbeth and Weidhaas in support of Dr. Harwood's testimony. [Dkt. Nos. 2115, 2116-4, Ex. F and 2116-5, Ex. G, respectively]. These declarations make clear that Drs. Macbeth and Weidhaas are the scientists who actually

completed the "biomarker" work referenced in Dr. Harwood's expert report. They supply rationales, justifications, and considerations never before mentioned by Dr. Harwood. *See, e.g.*, Dkt. No. 2115, Ex. G ¶¶4-7 (Dr. Weidhaas setting out literature and MST methods purportedly employed in development of biomarker); *id.* at 10-11 (excusing Dr. Harwood's failure to perform statistical analyses); Dkt. No. 2115 Ex. F ¶¶7-12 (Dr. Macbeth explaining procedures that Northwind labs followed in developing biomarker methodology). This supports Defendants' motion to preclude Dr. Harwood from testifying and also justifies the exclusion of these improper declarations. *See generally*, Dkt. No. 2115.

As the Seventh Circuit held in *Dura*, an expert may not serve as the mouthpiece for the work of others, and those others, who exercised independent technical expertise and judgment, are not permitted to appear now for the first time at the *Daubert* stage to save the testifying expert. *Dura*, 285 F.3d at 613-14. As with Dr. Chappell, to the extent that Plaintiffs intended to rely on the work performed by Dr. Macbeth and Dr. Weidhaas, they should have been disclosed as experts in order to allow Defendants a full and fair opportunity to assess their contributions in that light. Without the required analyses, Defendants are now prejudiced in their ability to respond to these late-added disclosures and opinions.

Separately, Drs. Macbeth and Weidhass both testify as to samples gathered and tests run long after the expert reporting cutoff date. Indeed, it appears from their testimony that since submitting their expert reports Plaintiffs have tested hundreds of samples with their purported biomarker methodology. *See, e.g.*, Dkt. No. 2115, Ex. G ¶¶4, 8-9 (Dr. Weidhaas testifying to testing in Oklahoma, Georgia, Florida, Minnesota, Utah, Arkansas, Colorado, Idaho, West Virginia, and Ohio); Dkt. No. 2115, Ex. F ¶¶5-6 (Dr. Macbeth testifying to the same, and also

relying on Dr. Sadowsky's tardy analysis). None of these samples or test results has ever been reviewed by, or even produced to, Defendants.

Because their opinions represent undisclosed expert testimony and new, untimely analysis, the declarations (and corresponding attachments) of Drs. Macbeth and Weidhaas should be stricken in their entirety.

E. Darren Brown's "affidavit" filed in support of Plaintiffs' *Daubert* challenge to Jay Churchill presents untimely, supplemental, and rebuttal testimony and should be stricken.

When filing their Motion in Limine to preclude the expert testimony of Defendants' witness Jay Churchill, Plaintiffs introduced a declaration by Darren Brown.[7] [Dkt. No. 2058-7, Ex. F]. Plaintiffs are attempting to bolster and strengthen the opinions of Mr. Brown through his declaration by merely supplementing earlier work, and by attempting to rebut Mr. Churchill's report for the defense by trying to rectify or explain away Churchill's criticisms of Plaintiffs' sampling program led by Brown. This is precisely the type of work that *Akeva* foretold could wreak havoc "in docket control and amount to unlimited expert opinion preparation." *Akeva v. Mizuno*, 212 F.R.D. 306, at 310 (M.D.N.C. 2002). Additionally, as noted, this Court has held that supplemental and rebuttal expert reports will not be allowed.

Mr. Brown's declaration is rebuttal in nature, and exceeds the permissible bounds of an expert errata. Although Mr. Brown oversaw the majority of the sampling efforts by Plaintiffs in this matter, Mr. Brown's original report was unclear as to which versions of the Standard Operating Procedures (SOPs) produced by Mr. Brown were actually followed by Plaintiffs' experts, if any. Unfortunately, Mr. Brown was also unable to articulate which of the SOPs, if any, were followed by Plaintiffs' other experts during his deposition testimony. *See* Exhibit C,

[7] The declaration is styled as an "Affidavit," but was not actually made under oath.

portions of Mr. Brown's deposition testimony at p. 18 - 20, 36 -37, and 43 - 52. Now Mr. Brown, through his "affidavit," attempts to rectify the problems pervasive throughout Plaintiffs' sampling campaign, Brown's own report, and his testimony by highlighting which SOPs Brown now claims his teams followed. Unfortunately for Mr. Brown, the time for such explanation passed over a year ago when his report was due. Mr. Brown's attempt to bolster his report by telling the defense at this late date which SOPs were supposedly used and to rebut Mr. Churchill's criticisms about Brown's previous failure to do so through this late-produced affidavit is not permissible under *Palmer*.[8]

In his affidavit, Mr. Brown seeks extensively to rebut Mr. Churchill's testimony from the hearing on Plaintiffs' preliminary injunction (PI) request. [Dkt. No. 2058-7, Ex. F at ¶4]. Mr. Churchill's PI hearing testimony was given February 22, 2008, some 12 weeks prior to Mr. Brown's submitting his report on May 15, 2008. Any pertinent observations of Mr. Churchill's PI testimony should have been included in Mr. Brown's May 15, 2008 report, rather than in this late-disclosed attack affidavit. Furthermore, several of the issues remarked upon in Mr. Brown's affidavit were, in fact, explained in Mr. Churchill's deposition testimony, which Mr. Brown apparently failed to review.[9] Mr. Brown also includes in his affidavit a "cross contamination mass evaluation" that is entirely new to his previously-submitted opinions. [Dkt. No. 2058-7, Ex. F, ¶26]. "Bolstering" beyond the expert reporting deadline is clearly impermissible. In *Dura*, 285 F.3d 609, the Court excluded affidavits of four professionals who had worked on a project, because their disclosure was untimely. Similarly, Mr. Brown had the opportunity in his report, and subsequently during his deposition testimony, to clarify CDM's SOPs and to offer

[8] In expressing disagreement with Mr. Churchill, Mr. Brown's affidavit offers no support satisfying *Daubert* criteria and, consequently, is not relevant to a *Daubert* analysis.
[9] Mr. Brown's affidavit makes no representation that he read Mr. Churchill's deposition testimony.

any opinions he formed in rebuttal to Mr. Churchill's PI testimony. Furthermore, there is not allowance under the Scheduling Order for Mr. Brown to come forward now with an analysis to try to explain away the cross-contamination of samples noted in Mr. Churchill's PI testimony and in his final report. Mr. Brown's failure to write a scientifically valid or understandable report does not justify the delays the admission of his affidavit would surely cause Defendants. Defendants' experts went forward with preparing opinions without the information they clearly should have had as to Plaintiffs' sampling techniques and SOPs, and Plaintiffs failed even to attempt any clarification of these uncertainties until now. Plaintiffs' calculated decision to keep the defense in the dark for so long – particularly when they are being criticized for the consequences of that decision – would, if not prohibited, lead to major rework by many of the defense experts (who wanted the sampling techniques and SOP information many months ago when they were doing their work in this case). For these reasons, the "affidavit" of Mr. Brown should be stricken. [Dkt. No. 2058, Ex. F].

F. Roger Olsen's declarations are untimely and should be stricken.

1. Dr. Olsen's declaration filed in support of Plaintiffs' Motion for Partial Summary Judgment presents untimely, supplemental testimony and should be stricken.

Dr. Olsen's declaration filed in support of Plaintiffs' Motion for Partial Summary Judgment presents untimely, supplemental testimony and should be stricken. [Dkt. Nos. 2062 and 2103-10, Ex. 116]. In this declaration, Dr. Olsen attempts to explain numerous figures and appendices in his original report issued on May 14, 2008. Specifically, Dr. Olsen adds testimony regarding Figures 6.5-2, 6.5-4, 6.5-6, and 6.5-8. If Dr. Olsen needed to convey this information, he should have included it in his original report. His omission up to now of information regarding concentrations, which bolsters his original opinions, is not the type of omission contemplated by Rule 26 and supplementation repairing this omission should not be allowed at

such a late date. Dr. Olsen is not correcting errors, but is adding supporting data and information to bolster his opinions.

Additionally, Dr. Olsen attempts to explain Appendix D, Table 1 of his report. Likewise, such explanations should have been included in his original report. Dr. Olsen's supplement through his declaration attached to Plaintiffs' Motion for Partial Summary Judgment should be stricken in its entirety. *Akeva v. Mizuno*, 212 F.R.D. 306, at 310 (M.D.N.C. 2002).

> *2. Dr. Olsen's declarations filed in support of Plaintiffs'* Daubert *challenge to Drs. Andy Davis and Glenn Johnson present untimely, supplemental testimony and should be stricken.*

Dr. Olsen's declaration filed in support of Plaintiffs' *Daubert* challenge to Dr. Andy Davis presents untimely, supplemental testimony and should be stricken. [Dkt. No. 2064-4, Ex. 3]. *See Dixie Steel Erectors, Inc. v. Grove U.S. L.L.C.*, No. CIV-04-390-F, 2005 WL 3558663, at *10 (W.D. Okla. Dec. 29, 2005) (striking attack declaration).

Dr. Olsen's declaration discusses whether dry weight concentrations are "the only consistent and comparable results" and how dry weight concentrations are used by scientists. None of these issues were included in his previous expert disclosures or report, so Defendants have had no opportunity to explore Dr. Olsen's expertise or opinions on this topic. Neither does his report contain a description of having used the measured value of the moisture content to calculate the dry weight of the sediment samples, as Dr. Olsen states in his new declaration. If he had ever made those types of disclosures on a timely basis, Plaintiffs would have simply cited to Dr. Olsen's timely disclosed opinions for these propositions rather than having to rely on a new substantive declaration to try and wedge these new disclosures into the case.

Dr. Olsen's report provides an in-depth account of his sampling methodology. (Olsen R. at 2-20 – 2-22.) In over two pages, Dr. Olsen describes the methodology and practice for taking

sediment samples in rivers and small lakes. *Id.* With regard to the laboratory analysis, Dr. Olsen states: "during Phase 2, sediments were analyzed in the laboratory for their size fraction distribution, as well as for nutrients, metals and bacteria." *Id.* at 2-22. There is no mention of wet or dry weight concentrations, percentages, or calculations. Dr. Olsen testified that he converted the poultry weight to dry weight ***to be consistent with Dr. Engel's cattle waste calculations, which used dry weight***. [Exhibit D, Portions of Olsen Dep. Vol. I at 172:23 – 173:9].

In his new declaration, Dr. Olsen draws attention to Table 18 in Appendix D of his report. Table 18 is titled Summary of River Sediment Samples and reflects moisture as a single parameter; however, the table evidences nothing more than the fact that Dr. Olsen measured the moisture content of all the samples. *See* Olsen R. App. D, Table 18. The table listing moisture content does not establish the fact, or support the argument, that dry weight concentrations are universally used by all scientists, or that they are the only consistent and comparable results. That new contention in his declaration is beyond the scope of Dr. Olsen's timely disclosed opinions, rendering the new opinions supplemental and untimely.

Similarly, Dr. Olsen's declaration filed in support of Plaintiffs' *Daubert* challenge to Dr. Glenn Johnson presents untimely new testimony and should be stricken. [Dkt. No. 2083-5, Ex. D]. In this declaration, Dr. Olsen further attempts to bolster his opinions regarding Principal Components Analysis (PCA) and controlling factor processes. Further, Dr. Olsen in his declaration attempts to correct values presented by Plaintiffs' counsel during the deposition of Dr. Johnson. [Dkt. No. 2083-5, Ex. D at 7, ¶ 9]. While Plaintiffs' counsel may have misspoken during Dr. Johnson's deposition, it is not for Dr. Olsen to make such a correction and to offer such an opinion.

Dr. Olsen also cites some literature in his declaration that he did not previously consider in his expert report, presumably to try and bolster his opinions at this late date. [Dkt. No. 2083-5, Ex. D at 14, paragraph 14]. While this is literature cited by Dr. Johnson, it is not appropriate at this point in time for Dr. Olsen to claim reliance on this literature and render supplemental opinions based upon it.

Finally, Dr. Olsen continually refers to and defines terms in his declaration that were previously unconsidered in his original report, such as "salty." [Dkt. No. 2083-5, Ex. D at 12, 15 – 16, and 29]. All of Dr. Olsen's declarations are supplemental in nature, untimely, and should be stricken in their entirety. *Akeva v. Mizuno*, 212 F.R.D. 306, at 310 (M.D.N.C. 2002).

G. Christopher Teaf's declaration filed in support of Plaintiffs' *Daubert* challenge to Dr. Timothy Sullivan and his affidavit filed in support of Plaintiffs' Opposition to summary judgment (RCRA) present untimely new testimony and should be stricken.

1. Dr. Teaf's declaration filed in support of Plaintiffs' Daubert *challenge presents untimely, supplemental testimony and should be stricken.*

In Plaintiffs' Motion in Limine to Preclude the Expert Testimony of Defendants' Witness Timothy J. Sullivan, Ph.D., a declaration by Dr. Chris Teaf is incorporated and attached. [Dkt. Nos. 2071 and 2071-4, Ex. C, respectively]. The majority of Dr. Teaf's declaration serves as a disallowed rebuttal report to Dr. Sullivan's work. As discussed *supra*, this Court held that expert rebuttal reports should not be anticipated, would not be admitted, and would ultimately "increase the cost of this litigation and delay its ultimate resolution." [Dkt. Nos. 1787 and 1842, respectively].

Dr. Teaf's declaration is also beyond the bounds of appropriate supplementation because it does not attempt to correct anything in his prior work. Although Dr. Teaf's expert report contained a discussion of the geometric mean standards found in Oklahoma Administrative Code

Title 785, Chapter 45, Dr. Teaf's analysis focused on compliance with Oklahoma's water quality criteria. In contrast, Dr. Sullivan uses a geometric means analysis of bacterial levels to demonstrate the fact that the Illinois River Watershed is no different than several other watersheds throughout the State. Because Dr. Teaf's original report did not contain this type of analysis, his declaration on such matters cannot be said to correct anything in his report. Therefore, under the prior rulings of this Court, Dr. Teaf's declaration is a disallowed rebuttal to Dr. Sullivan's work. [Dkt. Nos. 1787 and 1842].

As the Court in *Palmer, supra,* held, "Under Rule 26(a)(2), courts may exclude specific opinions or bases for the expert's opinions that were not fairly disclosed in the expert's report." *Palmer* at *2. Supplementation "means correcting inaccuracies or filling the interstices of an incomplete report ***based upon information that was not available*** at the time of the initial disclosure." *Keener v. United States*, 181 F.R.D. 649, 640 (D. Mont. 1998) (emphasis added). Rule 26(e) imposes a duty to supplement – it does not grant Plaintiffs the right to belatedly produce new expert opinions. *See St. Paul Mercury Ins. Co. v. Capitol Sprinkler Inspection, Inc.*, No. 05-2115 (CKK), 2007 WL 1589495, at *9 (D.D.C. 2007).

The information included in Dr. Teaf's declaration was readily available at the time of his original report and during his deposition testimony, but he failed to address it or offer these opinions in a timely fashion. Therefore, Dr. Teaf's declaration should be stricken in its entirety.

2. Dr. Teaf's affidavit filed in support of Plaintiffs' Opposition to Motion for Summary Judgment presents untimely, supplemental testimony and should be stricken.

Dr. Teaf's opinions contained in his June 1, 2009 affidavit, Dkt. No. 2130-3, Ex. 82, filed in support of Plaintiffs' opposition to *Defendants' Joint Motion for Summary Judgment on Plaintiffs' RCRA Claim (Count 3)* (Dkt. No. 2125) are likewise improper because they are beyond the bounds of appropriate supplementation of the opinions offered in Dr. Teaf's expert

report, and because they constitute improper rebuttal testimony to various expert opinions offered by Defendants. For example, in his affidavit, Dr. Teaf asserts new opinions related to the survivability of bacteria in the environment and new speculations as to why the Oklahoma State Department of Health has never conducted an outbreak investigation in the IRW. *See* Dkt. No. 2130-3, Ex. 82, ¶¶ 7, 8, and 14. These opinions cannot reasonably be understood as supplementing Dr. Teaf's prior opinions and, instead, represent Dr. Teaf's offering of new opinions in an attempt to cure the deficiencies of his prior testimony as identified by Defendants. Therefore, Dr. Teaf's affidavit filed as Exhibit 82 to Docket No. 2130-3 should be stricken by this Court.[10]

H. Plaintiffs' expert declarations submitted in opposition to Defendants' *Daubert* motions present untimely, supplemental testimony and should be stricken.

In addition to the aforementioned new expert materials that Plaintiffs submitted in support of their own motions, Plaintiffs responded to Defendants' *Daubert* motions by submitting more than a hundred pages of new, previously undisclosed expert opinions in the form of declarations. For example, Dr. Engel submitted a 33-page detailed declaration akin to a second expert report in response to Defendants' *Daubert* motion. *See* Dkt. No. 2158-1, Ex. C. The new declaration sets forth new opinions on a variety of topics, and frankly admits that it consists of new expert opinion created specifically to respond to the recent deposition of a

[10] In addition to the new declaration and affidavit discussed *supra*, Dr. Teaf has authored another new Declaration dated June 4, 2009. Plaintiffs filed Dr. Teaf's new Declaration as Exhibit 1 to Plaintiff's Response in opposition to Defendants' *Motion to Exclude the Testimony of Dr. Teaf*. *See* Dkt. No. 2156-2, Ex. 1. Remarkably, Dr. Teaf's new Declaration consists of his own self-serving opinions that he is qualified to render the expert opinions challenged in Defendants' *Motion* and his opinion that his earlier opinions are reliable and admissible. *See, e.g., id*. at 4, 5, 14-18. Therefore, Dr. Teaf's Declaration should be excluded because it is nothing more than his own *ipse dixit* statements that his opinions should not be excluded under *Daubert* and this determination is reserved exclusively for the Court.

defense expert and to the points raised in Defendants' *Daubert* motion. *See id.* at ¶6 ("I have studied the Daubert Motion of the Defendants …. I also attended the deposition of Dr. Bierman, the Defendants' modeling expert. The points I will make are based on my experience, the scientific literature, Dr. Bierman's deposition, and the Defendants' motion."). This new expert report comes complete with a lengthy bibliography of the scientific literature Dr. Engel consulted to draft what is essentially a new expert report. *See id.* at 34-37.[11]

This endless expert tit-for-tat is not appropriate. Rule 26 and this Court's scheduling Orders exist precisely to prevent this conduct.[12] If these new expert declarations are not stricken, Defendants will be required to go through another round of expert work to offer a fresh round of rebuttal opinions to Plaintiffs' latest expert reports. This would result in an unnecessary waste of resources and would necessitate a postponement of the trial date.

IV. CONCLUSION

As the Court is aware, "the orderly conduct of litigation demands that expert opinions reach closure." *Miller v. Pfizer, Inc.*, 356 F.3d 1326, 1334 (10th Cir. 2004). Permitting Plaintiffs' continual supplementation of their expert work and permitting new expert opinions one year beyond the close of Plaintiffs' expert deadlines unfairly prejudices Defendants and is counter to the timely resolution of this matter. Further, Plaintiffs' blatant defiance of previous Court oOrders regarding supplementation and rebuttal work walks dangerously close to the line of bad faith. For the reasons stated herein, Defendants respectfully request the Court strike the

[11] Similarly, Plaintiffs' opposition to Defendants' *Daubert* motion seeking to preclude Dr. Olsen's testimony includes additional sampling and investigation conducted by Dr. Berton Fisher well after the running of the expert discovery deadline. *See* Dkt. No. 2198, Ex. H.

[12] Plaintiffs have served some declarations that do no more than quote the material in Plaintiffs' expert reports. Defendants do not seek to strike those declarations in this motion, but rather focus on the hundreds of pages of entirely new analyses and expert opinions that Plaintiffs attached to their recent motions and response briefs.

aforementioned new expert opinions that Plaintiffs submitted in response to the recent summary judgment and *Daubert* briefs [*e.g.* R. Chappell, Dkt. No. 2072-6, Ex. E and 2198, Ex. E; J. Loftis, Dkt. Nos. 2064-5, Ex. 4; 2083-4, Ex. C; 2074-4, Ex. C; 2072-5, Ex. D; 2116-6, Ex. H; and 2198, Ex. D; M. Sadowsky, Dkt. Nos. 2116-1, Ex. D1; 2116-2, Ex. D2; and 2116-3, Ex. E; T. Macbeth , Dkt. No. 2116-4, Ex. F; J. Weidhaas, Dkt. No. 2116-5, Ex. G; D. Brown, Dkt. No. 2058-7, Ex. F; R. Olsen, Dkt. Nos. 2103-10, Ex. 116; 2064-4, Ex. 3; and 2083-5, Ex. D; C. Teaf, Dkt. No. 2071-4, Ex. C; 2130-3, Ex. 82; and 2156-2, Ex. 1; B. Engel, Dkt. No. 2158-1, Ex. C; and, B. Fisher, Dkt. No. 2198, Ex. H] and for any and all other relief to which they may be entitled.

Respectfully submitted,

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